

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TROY MCRAE,

Plaintiff,

v.

9:14-CV-00783
(GLS/TWD)

C.O. GENTILE, et al.,

Defendants.

APPEARANCES:

OF COUNSEL:

TROY MCRAE
Plaintiff pro se
06-A-3212
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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Attorney General for the State of New York
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The Capitol
Albany, NY 12224

CATHY Y. SHEEHAN, ESQ.

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

ORDER AND REPORT-RECOMMENDATION

This *pro se* prisoner civil rights action, commenced by Plaintiff Troy McRae pursuant to 42 U.S.C. § 1983, has been referred to me for Report and Recommendation by the Honorable Gary L. Sharpe, United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c). Plaintiff claims that Defendants have violated his Eighth Amendment right to be free from cruel and unusual punishment by subjecting him to excessive force, failing to intervene in the use of excessive force, and deliberate indifference to his serious medical needs. (Dkt. No.

37.) Currently pending before the Court is a motion to dismiss Plaintiff's Amended Complaint (Dkt. No. 43) for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), as to Defendants Peters, Gifford, McConnell, and Graham.¹ Plaintiff opposes the motion. (Dkt. No. 47.) For the reasons that follow, I recommend that Defendants' motion be granted in part and denied in part.

I. BACKGROUND

The following facts are derived from the face of the Plaintiff's Amended Complaint (Dkt. No. 37) and are accepted as true for the purposes of deciding the pending motion to dismiss. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Plaintiff alleges that on May 2, 2012, Defendant Corrections Officer Gentile ("CO Gentile") pinned his hands against the iron bars of a cell and repeatedly punched him. (Dkt. No. 37 at ¶ 13.) CO Gentile, along with Corrections Officers Peters ("CO Peters") and Gifford ("CO Gifford") and other unidentified Corrections Officers, then brought Plaintiff to a single room. *Id.* at ¶ 14. There, CO Gentile battered Plaintiff for fifteen minutes while CO Peters and CO Gifford "looked on . . . with delight." *Id.* at ¶ 15-16. Plaintiff immediately made Defendant Corrections Officer McConnell ("CO McConnell") aware of the injuries he sustained as a result of the incident while CO McConnell was on duty near Plaintiff's cell. *Id.* at ¶ 20. However, CO McConnell ignored Plaintiff's request for medical attention. *Id.* Plaintiff made Defendant Superintendent Graham ("Graham") aware of the incident through the prison's administrative grievance procedure, but to no avail. *Id.* at ¶ 18.

¹ Plaintiff's Amended Complaint names eleven Defendants, including the four moving to dismiss here. Defendant Gentile has not moved to dismiss the excessive force claim that Plaintiff alleges in the Amended Complaint. The remaining six Defendants in the Amended Complaint are other Corrections Officers who have not yet been served. (Dkt. No. 37 at ¶ 1.)

In Plaintiff's memorandum in opposition to the present motion, Plaintiff adds the allegation that Defendant Graham failed to "properly train and supervise his subordinate officers," and that if the Corrections Officers who committed the constitutional violations had been properly trained to handle prisoners, then the alleged assault would not have happened. (Dkt. No. 47-1 at 9.)

II. LEGAL STANDARD GOVERNING MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

A defendant may move to dismiss a complaint on the ground that the complaint fails to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). In order to state a claim on which relief can be granted, a complaint must contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The requirement that a plaintiff "show" that he or she is entitled to relief means that a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (emphasis added). "Determining whether a complaint states a plausible claim for relief . . . requires the . . . court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Id.* at 679 (internal citation and punctuation omitted).

"In reviewing a complaint for dismissal under Rule 12(b)(6), the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (citation omitted). Courts are "obligated to construe a *pro se* complaint liberally." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (citation omitted). However, "the tenet that a court must accept as true all of the

allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”

Iqbal, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

Where a party is proceeding *pro se*, the court is obliged to “read [the *pro se* party’s] supporting papers liberally, and . . . interpret them to raise the strongest arguments that they suggest.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994); *see also Harris*, 572 F.3d at 72 (courts remain obligated to construe *pro se* complaints liberally even after *Twombly*). Where a *pro se* complaint fails to state a cause of action, the court generally “should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.” *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (citation and internal quotation marks omitted). An opportunity to amend is not required where “the problem with [the plaintiff’s] causes of action is substantive” such that “better pleading will not cure it.” *Id.* (citation omitted).

III. ANALYSIS

A. CO Peters and CO Gifford

Plaintiff claims that CO Peters and CO Gifford violated his Eighth Amendment right to be free from excessive force by their failure to intervene while he was being beaten by CO Gentile and an unnamed Corrections Officer. (Dkt. No. 37 at ¶ 28.)

“The Eighth Amendment requires prison officials to take reasonable measures to guarantee the safety of inmates in their custody.” *Hayes v. New York City Dept. of Corrs.*, 84 F.3d 614, 620 (2d Cir. 1996) (citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). Law enforcement officials, including prison officials, can be held liable under § 1983 for failing to intervene in a situation where another official is violating an inmate’s constitutional rights,

including the use of excessive force, in their presence. *Curley v. Vill. of Suffern*, 268 F.3d 65, 72 (2d Cir. 2001); *see also Anderson v. Branen* 17 F.3d 552, 557 (2d Cir. 1994) (prison officials' Eighth Amendment duty to take reasonable measures to guarantee the safety of inmates in their custody includes a duty to protect inmates from harm threatened by other officers). A state actor can be held liable for failure to prevent another state actor from committing a constitutional violation if "(1) the officer had a realistic opportunity to intervene and prevent the harm; (2) a reasonable person in the officer's position would know that the victim's constitutional rights were being violated; and (3) the officer does not take reasonable steps to intervene." *Jean Laurent v. Wilkinson*, 540 F. Supp. 2d 501, 512 (S.D.N.Y. 2008), *aff'd*, 461 F. App'x 18 (2012).

The reasonable opportunity element is an issue of fact to be decided by the jury, unless there is only one possible reasonable conclusion from the evidence. *Anderson*, 17 F.3d at 557. Generally, a reasonable opportunity on the part of the corrections officer will not be found if the alleged constitutional violation was sudden or brief. *Tafari v. McCarthy*, 714 F. Supp. 2d 317, 342 (N.D.N.Y. 2010). Courts in this District have found the reasonable knowledge element present in cases involving beatings by other corrections officers. *Cusamano v. Sobek*, 604 F. Supp. 2d 416, 428 (N.D.N.Y. 2009).

Defendant contends that Plaintiff has only alleged "conclusory facts as to CO Peters and CO Gifford" (Dkt. No. 43-1 at 3), referring to the allegation in the Amended Complaint that the two "looked on . . . with delight" (Dkt. No. 37 at ¶ 16), while CO Gentile and another Corrections Officer beat him. *Id.* at ¶ 15. The Court disagrees. If all facts that Plaintiff has alleged in the Amended Complaint are assumed true for the purposes of the present motion, then CO Peters and CO Gifford stood by for fifteen minutes and chose to do nothing while Plaintiff was dragged to a room. *Id.* at ¶ 15-16 There, Plaintiff was continuously punched, kicked, and

choked by two other corrections officers, in violation of his Eighth Amendment right to be free from excessive force. *Id.* at ¶ 15. Therefore, the Amended Complaint alleges sufficient facts that, taken as true, give rise to the reasonable inference that Defendants CO Peters and CO Gifford failed to intervene under § 1983. Accordingly, I recommend that Defendants' Rule 12(b)(6) motion to dismiss be denied as to Defendants CO Peters and CO Gifford.

B. CO McConnell

Plaintiff alleges that Defendant CO McConnell, by denying him medical care, showed deliberate indifference to his serious medical needs in violation of his Eighth Amendment right to be free from cruel and unusual punishment. (Dkt. No. 37 at ¶ 29.) *See Farmer*, 511 U.S. at 832 (1994).

A claim that prison officials have intentionally disregarded an inmate's serious medical needs has both objective and subjective elements. *See Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir. 2009). "The plaintiff must show that she or he had a serious medical condition and that it was met with deliberate indifference." *Id.* at 72 (citation and internal quotation marks omitted). "The objective 'medical need' element measures the severity of the alleged deprivation, while the subjective 'deliberate indifference' element ensures that the defendant prison official acted with a sufficiently culpable state of mind." *Smith v. Carpenter*, 316 F.3d 178, 183-84 (2d Cir. 2003) (citations omitted).

A "serious medical condition" is "a condition of urgency, one that may produce death, degeneration, or extreme pain." *Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt J. dissenting) (citations omitted), *accord Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998). Relevant factors to consider when determining whether an alleged medical condition is sufficiently serious include, but are not

limited to: (1) the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; (2) the presence of a medical condition that significantly affects an individual's daily activities; and (3) the existence of chronic and substantial pain.

Chance, 143 F.3d at 702-03.

Under the subjective element, medical mistreatment rises to the level of deliberate indifference only when it 'involves culpable recklessness, i.e., an act or a failure to act . . . that evinces 'a conscious disregard of a substantial risk of serious harm.'" *Id.* at 703 (quoting *Hathaway*, 99 F.3d at 553). "Non-medical personnel engage in deliberate indifference where they intentionally delay access to medical care when the inmate was in extreme pain and had made his personal problem known to the attendant prison personnel." *Bauman v. Walsh*, 36 F. Supp. 2d 508, 512 (N.D.N.Y. 1999) (citation and internal quotation marks omitted).

Defendant contends that Plaintiff's claim should be dismissed as to CO McConnell. (Dkt. No. 43-1 at 3.) In support of this argument, Defendant points out that the Amended Complaint merely recites the elements of a § 1983 claim of this category, and does not "describe the events with nearly enough specificity" to support the claim. *Id.* at 4. The Court agrees. The Amended Complaint is devoid of facts plausibly showing that Plaintiff had an objectively serious medical condition as required to satisfy the objective prong of the Eighth Amendment inquiry. (Dkt. No. 37 at ¶ 4.) In fact, the Amended Complaint includes no factual allegations describing injuries allegedly sustained as a result of the beating. (*See* Dkt. No. 37.) As for the subjective element, Plaintiff's Amended Complaint alleges only that CO McConnell was "made aware of plaintiff's situation, but refused to assist plaintiff, in receiving emergency medical help," and that CO McConnell "ignored [Plaintiff's] request for [emergency medical help.]" *Id.* at ¶ 20. Plaintiff has not set forth facts plausibly showing that CO McConnell acted with a "conscious

disregard of a substantial risk of serious harm.” *Chance*, 143 F.3d at 702-03. Plaintiff has failed to assert factual allegations plausibly showing serious injury and CO McConnell’s awareness of the serious injury. *Id.* Accordingly, I recommend that Defendant’s Rule 12(b)(6) motion to dismiss be granted with leave to amend as to Defendant CO McConnell.

C. Superintendent Graham

1. Personal Capacity

Under Second Circuit precedent, “personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.” *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (quoting *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991)). In order to prevail on a § 1983 cause of action against an individual, a plaintiff must show some “tangible connection” between the unlawful conduct and the defendant. *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986). If the defendant is a supervisory official, a mere linkage to the unlawful conduct through the prison chain of command (i.e., under the doctrine of respondeat superior) is insufficient to show his or her personal involvement in that unlawful conduct. *Polk Cnty. v. Dodson*, 454 U.S. 312, 325 (1981); *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir. 2003) (per curiam); *Wright*, 21 F.3d at 501; *Ayers v. Coughlin*, 780 F.2d 205, 210 (2d Cir. 1985) (per curiam). In other words, supervisory officials may not be held liable merely because they held positions of authority. *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996) (citations omitted). Rather, supervisory personnel may be considered personally involved if they: (1) directly participated in the violation; (2) failed to remedy that violation after learning of it through a report or appeal; (3) created, or allowed to continue, a policy or custom under which the violation occurred; (4) had been grossly negligent in managing subordinates who caused the violation; or (5) exhibited deliberate indifference to the rights of inmates by failing to act on

information indicating that the violation was occurring. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (citations omitted). Here, Plaintiff alleges the second and fifth *Colon* categories, both of which turn on Defendant Graham's denial of Plaintiff's grievance.

District courts in the Second Circuit are split on whether a prison superintendent's review and denial of a prisoner's grievance supports a finding of personal involvement. *See Burton v. Lynch*, 664 F. Supp. 2d 349, 360 (S.D.N.Y. 2009). Some courts have held that merely affirming the denial of a grievance does not constitute personal involvement. *Id.* (citing *Warren v. Goord*, 476 F. Supp. 2d 407, 413 (S.D.N.Y. 2007)). Those courts require that the supervisor undertake an investigation into the alleged constitutional violation in order for a finding of personal involvement to be proper. *Burton*, 664 F. Supp. 2d at 360 (citing *Warren*, 476 F. Supp. 2d at 413). Other courts have found that a "detailed and specific" response to the allegations in a grievance is necessary to warrant a finding of personal involvement. *Burton*, 664 F. Supp. 2d at 360 (quoting *Brooks v. Chappius*, 450 F. Supp. 2d 220, 226 (W.D.N.Y. 2006)). Finally, some courts have held that the constitutional violation that is the subject of the grievance must be ongoing, rather than a single isolated incident, such that the supervisor is capable of directly remedying the violation. *Burton*, 664 F. Supp. 2d at 360 (citing *Vega v. Artus*, 610 F. Supp. 2d 185, 198 (N.D.N.Y. 2009)).

In this case, the Court does not need to adopt a particular position, because the Amended Complaint does not sufficiently allege any of the above requirements for a finding of personal involvement. The Amended Complaint alleges that Defendant Graham is the warden of Auburn Correctional Facility, that he "is responsible for receiving all grievances" filed at Auburn (Dkt. No. 37 at ¶ 8), and that he failed to discipline the individuals who allegedly participated in the constitutional violations of which Plaintiff complained through the grievance process. *Id.* at ¶¶

18, 30. There is no allegation in the Amended Complaint that Defendant Graham undertook an investigation into the alleged violations of Plaintiff's constitutional rights or that Defendant Graham provided a detailed response to any grievance Plaintiff filed.

Plaintiff has similarly failed to allege an ongoing violation of his constitutional rights by prison employees. Plaintiff only refers to one isolated incident as the basis for Defendant Graham's personal involvement in the alleged violation of his constitutional rights. (Dkt. No. 37 at ¶ 30.) Defendant Graham had no ability to directly remedy the alleged violation at the time Plaintiff submitted his grievance. *See Burton*, 664 F. Supp. 2d at 362 (holding that a grievance alleging one beating with no reference to a continued threat of injury failed to allege an ongoing constitutional violation); *Young*, 15 F. Supp. 3d at 193 (holding that a grievance alleging one incident of deliberate indifference to serious medical needs failed to allege an ongoing constitutional violation). Accordingly, I recommend that Defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) should be granted with leave to amend as to Defendant Graham in his personal capacity.

In his memorandum in opposition to the present motion to dismiss, Plaintiff adds the allegation that Defendant Graham's negligent training and supervision of the Defendant Corrections Officers caused the Plaintiff's injuries. (Dkt. No. 47-1 at 9.) Aside from this conclusory allegation about the training and supervision of the Corrections Officer Defendants, Plaintiff provides no facts to support Defendant Graham's personal involvement in the alleged assault. "Vague and conclusory allegations that a supervisor" negligently failed to train or supervise "subordinate employees" are not sufficient to establish personal involvement so as to give rise to personal liability. *White v. Fischer*, No. 9:09-CV-240 (DNH/DEP), 2010 WL

624081, at *6, 2010 U.S. Dist. LEXIS 15492, at *19 (N.D.N.Y. Feb. 18, 2010)²; *see also Pettus v. Morgenthau*, 554 F.3d 293, 300 (2d Cir. 2009) (vague and conclusory allegations that a supervisor failed to properly monitor the actions of subordinate employees do not suffice to establish the requisite personal involvement and support a finding of liability).

Due to the absence of factual allegations by Plaintiff to make a facially plausible showing of personal involvement by Defendant Graham related to the alleged assault, I recommend that the motion to dismiss the Amended Complaint be granted as to this claim as well. However, in deference to Plaintiff's *pro se* status and to the fact that he has not had the opportunity to make this allegation in a formal complaint, I also recommend that the dismissal be without prejudice, and that Plaintiff be granted leave to amend.

2. Official Capacity

The Eleventh Amendment bars suits for damages against state officials acting in their official capacities. *See Severino v. Negron*, 996 F.2d 1439, 1441 (2d Cir.1993) (“[I]t is clear that the Eleventh Amendment does not permit suit . . . for money damages against state officials in their official capacities.”). Moreover, the Eleventh Amendment bars official capacity suits for declaratory relief where the declaratory relief requested would serve only to declare a past action a violation of the law. *Green v. Mansour*, 474 U.S. 64, 74, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985). All DOCCS employees are state officials for the purposes of the Eleventh Amendment. *See, e.g., Davis v. New York*, 316 F.3d 93, 101 (2d Cir. 2002).

Graham is a DOCCS employee, and Plaintiff has requested both declaratory judgment and monetary damages against him. (Dkt. No. 37 at pp. 7-8.) Specifically, Plaintiff asks the Court to issue a declaratory judgment stating that Graham violated Plaintiff's constitutional

² The Court will provide a copy of the unpublished decision to Plaintiff pursuant to *LeBron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (*per curiam*).

rights through his failure to prevent prison employees from physically abusing the prisoners. *Id.* at p. 7. Because Graham is a DOCCS employee, and because of the retroactive nature of the relief Plaintiff requests, I recommend Defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim be granted with prejudice as to Plaintiff's claim for money damages and declaratory relief under § 1983 against Graham in his official capacity. While leave to amend should ordinarily be freely given, in these circumstances "better pleading will not cure" Plaintiff's substantive problem with the cause of action against Graham in his official capacity. *Cuoco*, 222 F.3d at 112 (citation omitted).

ACCORDINGLY, it is

RECOMMENDED that Defendants' motion to dismiss (Dkt. No. 43) for failure to state a claim be **GRANTED** with leave to amend as to Defendant CO McConnell and Defendant Superintendent Graham in his personal capacity; and it is further

RECOMMENDED that Defendants' motion to dismiss (Dkt. No. 43) for failure to state a claim be **GRANTED** without leave to amend as to Defendant Superintendent Graham in his official capacity; and it is further

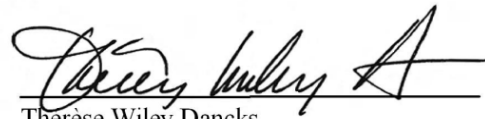
RECOMMENDED that Defendants' motion to dismiss (Dkt. No. 43) for failure to state a claim be **DENIED** as to Defendant CO Peters and Defendant CO Gifford; and it is further

ORDERED that the Clerk provide Plaintiff with a copy of the unpublished decision in *White v. Fischer*, No. 9:09-CV-240 (DNH/DEP), 2010 WL 624081 (N.D.N.Y. Feb. 18, 2010).

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL***

PRECLUDE APPELLATE REVIEW. *Roldan v. Racette*, 984 F.2d 85 (2d Cir.1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir.1989) (per curiam)); 28 U.S.C. § 636(b)(1) (Supp.2013); Fed.R.Civ.P. 72, 6(a).

Dated: October 20, 2015
Syracuse, New York



Therèse Wiley Dancks
United States Magistrate Judge

2010 WL 624081

Only the Westlaw citation is currently available.

United States District Court,
N.D. New York.

Jason R. WHITE, Plaintiff,

v.

Brian FISCHER, Commissioner, Dept.
of Correctional Services; Theresa A.
Knapp–David, Director, Classification and
Movement; and R. Woods, Superintendent,
Upstate Correctional Facility, Defendants.

No. 9:09–CV–240. | Feb. 18, 2010.

Attorneys and Law Firms

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New York, [Brian J. O'Donnell, Esq.](#), Asst. Attorney General,
of Counsel, Albany, NY, for Defendants.

DECISION and ORDER

[DAVID N. HURD](#), District Judge.

*1 Plaintiff, Jason R. White, commenced this civil rights action in February 2009, pursuant to [42 U.S.C. § 1983](#). By Report–Recommendation dated January 25, 2009, the Honorable David E. Peebles, United States Magistrate Judge, recommended that defendant's motion to dismiss (Dkt. No. 10) be granted, and that plaintiff's complaint in this action be dismissed without leave to replead. No objections to the Report–Recommendation have been filed.

Based upon a careful review of the entire file and the recommendations of Magistrate Judge Peebles, the Report–Recommendation is accepted and adopted in all respects. *See* [28 U.S.C. 636\(b\)\(1\)](#).

Accordingly, it is

ORDERED that

1. Defendant's motion to dismiss (Dkt. No. 10) is GRANTED;

2. Plaintiff's complaint in this action is DISMISSED without leave to replead; and

3. The Clerk is directed to file judgment accordingly and close the file.

IT IS SO ORDERED.

JASON R. WHITE,

Plaintiff,

-v.-

BRIAN FISCHER, THERESA A. KNAPP–DAVID, and R.
WOODS,

Defendants.

REPORT AND RECOMMENDATION

[DAVID E. PEEBLES](#), United States Magistrate Judge.

Plaintiff Jason R. White, a New York State prison inmate who is proceeding *pro se* and *in forma pauperis*, has commenced this action pursuant to [42 U.S.C. § 1983](#), alleging deprivation of his civil rights. In his complaint, plaintiff asserts that his transfer into special housing unit (“SHU”) disciplinary confinement at the Upstate Correctional Facility, to serve what was originally intended to be a three-month disciplinary sentence of less restrictive keeplock confinement imposed while at another facility, represented a deprivation of a liberty interest without the requisite procedural due process. As relief for the violation, plaintiff's complaint seeks an award of compensatory damages in the amount of \$25,000.

In response to plaintiff's complaint, defendants have moved seeking its dismissal for failure to state a cause of action upon which relief may be granted. In their motion, defendants argue that plaintiff's allegations do not demonstrate the existence of a meritorious due process claim since, at best, it implicates a failure of prison officials to comply with governing regulations regarding transfers into an SHU unit, a matter not of constitutional concern, noting further that plaintiff has no constitutional right to be designated to a particular correctional facility or to a desired security classification. Defendants also seek dismissal of plaintiff's claims against them based upon lack of personal involvement, and additionally assert their entitlement to qualified immunity from suit as a basis for their dismissal motion.

For the reasons set forth below, I find that White's complaint fails to set forth a plausible due process violation and that defendant Fischer is also entitled to dismissal of the claims against him based upon the lack of allegations showing of his personal involvement in the conduct allegedly giving rise to plaintiff's claims. I further recommend a finding that, even if plaintiff were able to plead a cognizable due process cause of action, defendants Knapp–David and Woods nonetheless should be granted qualified immunity from suit in this instance.

I. BACKGROUND¹

*2 Plaintiff is a prison inmate entrusted to the care and custody of the New York State Department of Correctional Services (“DOCS”). See generally Complaint (Dkt. No. 1). At the times relevant to his claims plaintiff was designated first to the Auburn Correctional Facility (“Auburn”), located in Auburn, New York, and later to the Upstate Correctional Facility (“Upstate”), located in Malone, New York. *Id.*, § 6.

On March 28, 2007, while confined at Auburn, plaintiff was found guilty following a Tier I II disciplinary hearing of engaging in violent conduct and refusing a direct order, in violation of disciplinary rules 104.11 and 106.10, respectively.² See Plaintiff's Memorandum (Dkt. No. 1–1) Exh. A.³ As a result of that determination plaintiff was sentenced to serve three months of keeplock confinement, with a corresponding loss of package, commissary, and telephone privileges. See *id.*

On April 11, 2007, while serving his keeplock sentence at Auburn, White was processed out of that facility and, following completion of an inter-prison transfer process which included a stop at another facility, was transferred into Upstate on or about April 13, 2007. Complaint (Dkt. No. 1) § 6. At Upstate, plaintiff was assigned to a two-person cell in the facility's SHU to serve the balance of his disciplinary confinement sentence.⁴ *Id.*

On April 23, 2007 plaintiff filed a grievance with prison authorities, arguing that his transfer into the SHU at Upstate was not authorized by DOCS directives. Complaint (Dkt. No. 1) § 6 at p. 4B; Plaintiff's Memorandum (Dkt. No. 1–1) Exh. C. The grievance was denied by the facility's Inmate Grievance Review Committee (“IGRC”). Complaint (Dkt. No. 1) § 6 at p. 4B; Plaintiff's Memorandum (Dkt. No. 1–1) Exh. D. Plaintiff appealed the denial to defendant Woods,

the Superintendent at Upstate, who upheld the IGRC's unfavorable determination by decision dated May 15, 2007. Complaint (Dkt. No. 1) § 6 at p. 4B. Plaintiff's Memorandum (Dkt. No. 1–1) Exh. D. Plaintiff's further appeal of the matter to the DOCS Central Office Review Committee (“CORC”) was likewise unsuccessful. *Id.* Exh. E.

Also on April 23, 2007, plaintiff sent a letter to the DOCS Commissioner Brian Fischer, complaining of the SHU designation. Plaintiff's Memorandum (Dkt. No. 1–1) Exh. F. That letter was referred by Commissioner Fischer to defendant Theresa A. Knapp–David, the DOCS Director of Classification and Movement. Complaint (Dkt. No. 1) § 6 at pp. 4B–4C. In response, defendant Knapp–David wrote to the plaintiff on May 7, 2007, advising that his SHU assignment was in accordance with established DOCS procedures. Plaintiff's Memorandum at (Dkt. No. 1.1) Exh. G.

II. PROCEDURAL HISTORY

Plaintiff commenced this action on February 27, 2009, and was thereafter granted leave to proceed *in forma pauperis*. Dkt. Nos. 1, 4. Named as defendants in plaintiff's complaint are Commissioner Fischer; Director Knapp–David; and Upstate Superintendent R. Woods. Complaint (Dkt. No. 1) § 3. Plaintiff's complaint asserts a single cause of action for deprivation of procedural due process. *Id.*, § 7.

*3 Following service, in lieu of answering plaintiff's complaint, defendants filed a motion to dismiss asserting a variety of grounds for the relief sought. Dkt. No. 10. In their motion defendants argue, *inter alia*, that plaintiff's complaint 1) does not implicate a cognizable due process violation, 2) plaintiff's complaint fails to establish their personal involvement in the deprivation alleged; and 3) in any event they are entitled to qualified immunity.⁵ Plaintiff has since responded in opposition to defendants' motion, Dkt. No. 13, which is now fully briefed and ripe for determination, and has been referred to me for the issuance of a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c). See also Fed.R.Civ.P. 72(b).

III. DISCUSSION

A. Dismissal Motion Standard

A motion to dismiss a complaint, brought pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, calls upon a court to gauge the facial sufficiency of that

pleading, utilizing as a backdrop a pleading standard which, though unexacting in its requirements, “demands more than an unadorned, the-defendant-unlawfully-harmed me accusation” in order to withstand scrutiny.*Ashcroft v. Iqbal*, — U.S. —, —, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555, 127 S.Ct. 1955, (2007)). Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Fed.R.Civ.P.* 8(a)(2). *Id.* While modest in its requirement, that rule commands that a complaint contain more than mere legal conclusions; “[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Ashcroft*, —U.S. —, 129 S.Ct. at 1950.

To withstand a motion to dismiss, a complaint must plead sufficient facts which, when accepted as true, state a claim which is plausible on its face.*Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir.2008) (citing *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974). As the Second Circuit has observed, “[w]hile *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to ‘nudge [plaintiffs]’ claims across the line from conceivable to plausible.” “*In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir.2007) (quoting *Twombly*, 550 U.S. at 570 127 S.Ct. at 1974). When assessing the sufficiency of a complaint against this backdrop, particular deference should be afforded to a *pro se* litigant whose complaint merits a generous construction by the court when determining whether it states a cognizable cause of action. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 2200 (2007) (“‘[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers’”) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292 (1976) (internal quotations omitted)).

B. Procedural Due Process

*4 In their motion, defendants assert that because plaintiff’s due process claim rests on alleged violations of DOCS regulations, his complaint in fact fails to assert a cognizable due process claim.

To successfully state a claim under 42 U.S.C. § 1983 for the denial of procedural due process arising out of a disciplinary hearing, a plaintiff must show that he or she 1) possessed an actual liberty interest, and 2) was deprived of that interest without being afforded sufficient procedural safeguards. *See Tellier v. Fields*, 260 F.3d 69, 79–80 (2d Cir.2000) (citations

omitted); *Hynes*, 143 F.3d at 658; *Bedoya v. Coughlin*, 91 F.3d 349, 351–52 (2d Cir.1996). Inmates’ liberty interests may arise out of the Due Process Clause of the Fourteenth Amendment, or state statute or regulation. *Arce v. Walker*, 139 F.3d 329, 333 (2d Cir.1998) (citing *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908 (1989)).

Recognizing that lawful imprisonment necessarily restricts the rights and privileges of inmates, the Supreme Court has narrowly circumscribed the scope of liberty interests arising out of the Due Process clause to protect only the most basic liberty interests of prisoners. *Hewitt v. Helms*, 459 U.S. 460, 467, 103 S.Ct. 864, 869 (1983). Accordingly, the Due Process Clause does not guard against every change in the conditions of confinement having a substantial adverse impact on inmates, but only those conditions or restraints that “exceed[] the sentence in ... an unexpected manner.” *Arce*, 139 F.3d at 333 (quoting *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293, 2300 (1995)).

In this instance plaintiff does not claim that he was denied procedural due process in connection with the disciplinary hearing that led to the imposition of a three-month period of keeplock confinement as a sanction. Instead, he argues that his due process rights were abridged after the sanction was imposed when, in violation of DOCS Directive No. 4933,⁶ he was transferred from keeplock confinement at Auburn to an SHU cell at Upstate, and as a result required to endure a more restrictive confinement. Unfortunately for plaintiff, neither the Due Process Clause nor state statute or regulation give rise to a liberty interest in these circumstances.

Preliminarily, it is well recognized that an inmate has no constitutional right to be incarcerated at a particular correctional facility, “and transfers among facilities do not need to be preceded by any particular due process procedure.” *Halloway v. Goord*, No. 9:03–CV01524, 2007 WL 2789499, at * 5 (N.D.N.Y. Sept. 24, 2007) (Kahn, J. and Treece, J.)⁷ (citing *Wilkinson v. Austin*, 545 U.S. 209, 221–22 (2005)) (other citation omitted); *see also*, *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir.2009) (per curiam); *Davis v. Kelly*, 160 F.3d 917, 920 (2d Cir.1998). As a result, the constitution did not present any impediment to plaintiff’s transfer to Upstate.

*5 Additionally, it is equally well established, as defendants now argue, that state regulations, including DOCS Directives, do not ordinarily confer constitutional rights sufficient to

give rise to a due process claim. *Snider v. Dylag*, 188 F.3d 51, 53 (2d Cir.1999) (citing *Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir.1993)); *Cusamano v. Sobek*, 604 F.Supp.2d 416, 482 (N.D.N.Y.2009). A state can, however, by statute or regulation confer a liberty interest which cannot be abridged without due process. *Black v. Lansberg*, No. 9:06-CV-1243, 2009 WL 3181111, at *3 (Sept. 29, 2009) (Suddaby, J., adopting Report and Recommendation of Lowe, M.J.). Nonetheless, contrary to plaintiff's contention, DOCS Directive No. 4933 does not give rise to a cognizable liberty interest.

It should be noted that on at least four separate occasions, addressing the same issues raised by the plaintiff in this case, this court has held that an inmate's transfer from keeplock to SHU after being sentenced to serve time in keeplock does not implicate a cognizable liberty interest. *McEachin v. Goord*, No. 9:06-CV-1192, 2008 WL 1788440 (N.D.N.Y. Apr. 17, 2008) (Hurd, J. and Treece, M.J.) (dismissing complaint alleging that plaintiff was unlawfully transferred from keeplock to SHU while serving disciplinary sentence); *Halloway*, 2007 WL 2789499 (granting summary judgment dismissing claim that plaintiff should have received hearing before transfer to Upstate after sentenced to keeplock at Elmira Correctional Facility); *Carlisle v. Goord*, No. 9:03-CV-296, 2007 WL 2769566, at *2 n. 1 (N.D.N.Y. Sept. 21, 2007) (Scullin, S.J., adopting Report and Recommendation of Lowe, M.J.) (granting summary judgment finding that "an inmate has no liberty interest in not having his sentence of keeplock confinement at one prison converted to a sentence of SHU confinement at another facility without receiving a hearing regarding the conversion."); and, *Chavis v. Kienert*, 9:03-CV-0039, 2005 WL 2452150, at *9-10 (N.D.N.Y. Sept. 30, 2005) (Scullin, C.J.) (finding that transfer from keeplock at Cossackie Correctional Facility to SHU at Upstate did not implicate a liberty interest). See also, *Holmes v. Grant*, No. 03-Civ. 3426, 2006 WL 851753, at *18-19 (S.D.N.Y. mar. 31, 2006 (dismissing claim plaintiff's claim that disciplinary sentence was improperly converted from keeplock sentence to SHU). These decisions are premised upon the court's conclusion that a transfer from keeplock in one facility to SHU in another does not implicate a constitutionally protected liberty interest and that "New York has not created, by regulation or statute, any liberty interest in remaining in one particular prison[.]" noting that "the DOCS ... possesses sole discretion to determine 'where a [state] inmate will be housed.'" *Halloway*, 2007 WL 2789499, at *5 (quoting *Grullon v. Reid*, No. 97 CIV. 7616, 1999 WL 436457, at *10 (S.D.N.Y. Jun. 24, 1999)) (other

citations omitted). These cases are indistinguishable from the case presently before the court.

*6 Moreover, contrary to the interpretation offered by the plaintiff, the court has read [section 301.6](#) of DOCS Directive No. 4933 as "explicitly permitt[ing] keeplock sentences to be served in SHU and subject to the same restrictions and amenities" *McEachin*, 2008 WL 1788440, at *4; see also, *Halloway*, 2007 WL 278499, at *5 ("[N]ot only do New York State Regulations permit keeplock sentences to be served in SHU, but further contemplate that assignments to SHU will be subject to the same ... limitations.") and *Holmes*, 2006 WL 851753, at *19 ("Section 301.6... relat[es] to keeplock admissions and authorizes placement of inmates in SHU 'at a medium or minimum security correctional facility or Upstate Correctional Facility... for confinement pursuant to disposition of a disciplinary (Tier II) or superintendent's (Tier II hearing.' ") (emphasis in original).

In view of the foregoing, it is clear that plaintiff's transfer from Auburn, where he was keeplocked, to SHU confinement at Upstate does not implicate a liberty interest arising out of either Due Process Clause, or state statute or regulation. According to plaintiff's complaint, he was sentenced to keeplock after a Tier III disciplinary hearing; he does not allege that he was denied due process in connection with that hearing. The Tier II I hearing that he was provided was all that was required by the constitution before he was sentenced to disciplinary confinement. *Holmes*, 2006 WL 851753, at *19. Plaintiff was entitled to no further procedure at the time of transfer to Upstate, and therefore cannot show that he was deprived of a protected liberty interest without due process of law.⁸ *Id.* Accordingly, I recommend that plaintiff's complaint be dismissed for failure to state a cause of action.

C. Personal Involvement

In their motion, defendants also challenge the sufficiency of plaintiff's allegations regarding their personal involvement in the constitutional deprivations alleged. Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under [section 1983](#). *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994) (citing *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir.1991) and *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir.1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 1282 (1978)). In order to prevail on a [section 1983](#) cause of action against an individual, a plaintiff must show some tangible connection between the constitutional violation alleged and

that particular defendant. See *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir.1986).

Two of the three defendants, Brian Fischer and Robert Woods, appear to be named as defendants in their supervisory capacities, based solely upon their positions as the DOCS Commissioner and the Superintendent at Upstate, respectively. As supervisors, neither of those individuals can be liable for damages under section 1983 solely by virtue of their respective positions as supervisor; there is no *respondeat superior* liability under section 1983. *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003); *Wright*, 21 F.3d at 501. Vague and conclusory allegations that a supervisor has failed to train or properly monitor the actions of subordinate employees will not suffice to establish the requisite personal involvement and support a finding of liability. *Pettus v. Morgenthau*, 554 F.3d 293, 300 (2d Cir.2009) (“To the extent that [a] complaint attempts to assert a failure-to-supervise claim ... [that claim is insufficient where] it lacks any hint that [the supervisor] acted with deliberate indifference to the possibility that his subordinates would violate [plaintiff's] constitutional rights.”). Culpability on the part of a supervisory official for a civil rights violation can, however, be established in one of several ways, including when that individual 1) has directly participated in the challenged conduct; 2) after learning of the violation through a report or appeal, has failed to remedy the wrong; 3) created or allowed to continue a policy or custom under which unconstitutional practices occurred; 4) was grossly negligent in managing the subordinates who caused the unlawful event; or 5) failed to act on information indicating that unconstitutional acts were occurring. *Iqbal v. Hasty*, 490 F.3d 143, 152–53 (2d Cir.2007), *rev'd on other grounds, sub nom., Ashcroft v. Iqbal*, —U.S. —, 129 S.Ct. 1937.; see also *Richardson*, 347 F.3d at 435; *Wright*, 21 F.3d at 501; *Williams v. Smith*, 781 F.2d 319, 323–24 (2d Cir.1986).

1. Commissioner Fischer

*7 Aside from allegations centering upon his role as the DOCS Commissioner, which are clearly insufficient in and of themselves to establish his liability, plaintiff's claims against defendant Fischer appear to revolve around the letter written by him to the Commissioner on or about April 23, 2007, complaining of his SHU confinement at Upstate. That letter, it appears from the limited materials now before the court, was referred to defendant Knapp–David for response. It is well established that when the Commissioner receives a letter and forwards it on to another individual for investigation and a response, his or her involvement

in the constitutional violation cannot be predicated solely upon those circumstances. *Sealey v. Giltmer*, 116 F.3d 47, 51 (2d Cir.1997); *Rivera v. Fischer*, No. 08–CV–6505L, 2009 WL 2981876, at *2 (W.D.N.Y. Sept. 18, 2009). I therefore recommend dismissal of plaintiff's claims against Commissioner Fischer on the basis of lack of his personal involvement.

2. Superintendent Woods

Plaintiff's claims against Superintendent Woods stand on slightly different footing. It is alleged that Superintendent Woods processed and affirmed the determination of the Upstate IGRC denying plaintiff's grievance regarding the relevant occurrences. His review of plaintiff's grievance arguably placed Superintendent Woods on notice of a constitutional violation, which was ongoing, at a time when he was potentially positioned to end the violation. On that basis I conclude that plaintiff has sufficiently alleged Superintendent Woods' personal involvement in the violation alleged to withstand defendants' dismissal motion. See *Charles v. New York State Dept. of Corr. Services*, No. 9:07–CV–1274, 2009 WL 890548, at *5–9 (N.D.N.Y. Mar. 21, 2009) (Hurd, J. and DiBianco, M.J.).

3. Director Knapp–David

Plaintiff's complaint alleges that in her position as the DOCS Director of Classification and Movement, defendant Knapp–David would have reviewed and approved his transfer from Auburn into Upstate. That allegation is buttressed by both her position with the DOCS and the fact that plaintiff's letter regarding the matter was referred to defendant Knapp–David for response explaining why the transfer was proper under DOCS regulations. On this basis, I conclude that plaintiff has stated a plausible claim against defendant Knapp–David and her personal involvement in the constitutional deprivations alleged.

D. Qualified Immunity

In their motion, defendants also assert entitlement to qualified immunity from suit. Qualified immunity shields government officials performing discretionary functions from liability for damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982) (citations omitted). “In assessing an officer's eligibility for the shield, ‘the appropriate question is the objective inquiry whether

a reasonable officer could have believed that [his actions were] lawful, in light of clearly established law and the information the officer[] possessed.” *Kelsey v. County of Schoharie*, 567 F.3d 54, 61 (2d Cir.2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692 (1999)). The law of qualified immunity seeks to strike a balance between the need to hold government officials accountable for irresponsible conduct and the need to protect them from “harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. —, 129 S.Ct. 808, 815 (2009).

*8 In *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001), the Supreme Court “mandated a two-step sequence for resolving government official’s qualified immunity claims.” *Pearson*, 555 U.S. —, 129 S.Ct. at 816. The first step required the court to consider whether, taken in the light most favorable to the party asserting immunity, the facts alleged show that the conduct at issue violated a constitutional right,⁹ *Kelsey*, 567 F.3d at 61, “the second step being whether the right is clearly established”, *Okin v. Village of Cornwall-On-Hudson Police Dept.*, 577 F.3d 415, 430 n. 9 (citing *Saucier*).¹⁰ Expressly recognizing that the purpose of the qualified immunity doctrine is to ensure that insubstantial claims are resolved prior to discovery, the Supreme Court recently concluded in *Pearson* that because “[t]he judges of the district courts and courts of appeals are in the best position to determine the order of decisionmaking [that] will best facilitate the fair and efficient disposition of each case”, those decision makers “should be permitted to exercise their sound discretion in deciding which of the ... prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand.”¹¹ *Pearson*, 555 U.S. —, 129 S.Ct. at 818, 821. In other words, as recently emphasized by the Second Circuit, the courts “are no longer required to make a ‘threshold inquiry’ as to the violation of a constitutional right in a qualified immunity context, but we are free to do so.” *Kelsey*, 567 F.3d at 61 (citing *Pearson*, 129 S.Ct. at 821) (emphasis in original).

For courts engaging in a qualified immunity analysis, “the question after *Pearson* is ‘which of the two prongs ... should be addressed in light of the circumstances in the particular case at hand.’” *Okin*, 577 F.3d 430 n. 9 (quoting *Pearson*). “The [*Saucier* two-step] inquiry is said to be appropriate in those cases where ‘discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional

violation at all.’” *Kelsey*, 567 F.3d at 61 (quoting *Pearson*, 129 S.Ct. at 818).

“The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156 (citation omitted). When deciding whether a right was clearly established at the relevant time, a court should consider

- (1) whether the right in question was defined with “reasonable specificity”;
- (2) whether the decisional law of the Supreme Court and the [Second Circuit] support the existence of the right in question; and (3)
- whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

*9 *Wright v. Smith*, 21 F.3d 496, 500 (2d Cir.1994) (quoting *Benitez v. Wolff*, 985 F.2d 662, 666 (2d Cir.1993)). The objective reasonableness test will be met, and qualified immunity enjoyed, where government officers of reasonable competence could disagree as to whether by his or her alleged conduct the defendant would be violating the plaintiff’s rights. *Okin*, 577 F.3d at 433 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986)). “If, on the other hand, no officer of reasonable competence would conclude that the conduct in question is lawful, there is no immunity.” *Okin*, 577 F.3d at 433 (citing *Lennon v. Miller*, 66 F.3d 416, 420–21 (2d Cir.1995)).

Applying the *Saucier* two-step inquiry here, I have already determined that plaintiff has failed to state a plausible constitutional violation. Moreover, even if plaintiff were able to distinguish the existing precedent in this district and allege a protected liberty interest that required that plaintiff be provided with additional due process before his transfer to Upstate, I conclude that any such right was far from a clearly established and that a reasonable person in the circumstances of defendant Woods and defendant Knapp–David would not have appreciated that the transfer of plaintiff into SHU confinement at Upstate represented a potential deprivation of plaintiff’s procedural due process rights beyond those addressed by the hearing officer. Accordingly, as an additional basis for dismissal, I recommend that both

defendants Woods and Knapp–David be granted qualified immunity from suit.

IV. SUMMARY AND RECOMMENDATION

At the heart of plaintiff's complaint in this action is his contention that his due process rights and DOCS regulations were violated when he was transferred from keeplock confinement at Auburn into an SHU cell at Upstate. Since such a claim, it is well established in this district, is not constitutionally cognizable, White has therefore failed to state a claim upon which relief may be granted. While plaintiff has failed to establish personal involvement on the part of Commissioner Fischer in an alleged deprivation and the claims against him should be dismissed on this additional basis, plaintiff has sufficiently alleged personal involvement on the part of defendant Knapp–David and R. Woods. Nonetheless, I find that those two defendants are entitled to qualified immunity from suit, providing an additional basis for dismissal of plaintiff's claims against them. Accordingly, it is hereby respectfully

RECOMMENDED that defendants' motion to dismiss (Dkt. No. 10) be GRANTED, and that plaintiff's complaint in this

action be DISMISSED, without leave to replead; and it is further

ORDERED that pending a final determination on defendants' dismissal motion, discovery in this action be and hereby is STAYED.

NOTICE: Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. [28 U.S.C. § 636\(b\)\(1\)](#); [Fed.R.Civ.P. 6\(a\)](#), [6\(d\)](#), [72](#); [Roldan v. Racette](#), 984 F.2d 85 (2d Cir.1993).

***10** It is hereby ORDERED that the clerk of the court serve a copy of this Report and Recommendation upon the parties in accordance with this court's local rules.

All Citations

Not Reported in F.Supp.2d, 2010 WL 624081

Footnotes

- 1 In light of the procedural posture of this case, the following recitation is drawn principally from plaintiff's complaint, the contents of which have been accepted as true for purposes of the pending motion. See [Erickson v. Pardus](#), 551 U.S. 89, 127 S.Ct. 2197, 2200 (2007) (citing [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007)); see also [Cooper v. Pate](#), 378 U.S. 546, 546, 84 S.Ct. 1733, 1734 (1964). I have also considered the exhibits attached to plaintiff's memorandum, which accompanied his complaint, to the extent that they are consistent with the allegations of his complaint. See [Donhauser v. Goord](#), 314 F.Supp.2d 119, 121 (N.D.N.Y.2004) (Hurd, J.).
- 2 The DOCS conducts three types of inmate disciplinary hearings. Tier I hearings address the least serious infractions, and can result in minor punishments such as the loss of recreation privileges. Tier II hearings involve more serious infractions, and can result in penalties which include confinement for a period of time in the SHU. Tier III hearings concern the most serious violations, and could result in unlimited SHU confinement and the loss of "good time" credits. See [Hynes v. Squillace](#), 143 F.3d 653, 655 (2d Cir.), cert. denied, 525 U.S. 907, 119 S.Ct. 246 (1998).
- 3 Plaintiff filed what he labeled as a "memorandum of law", with exhibits attached, in conjunction with his complaint. "Generally, a court may not look outside the pleadings when reviewing a Rule 12(b)(6) motion to dismiss. However, the mandate to read the papers of *pro se* litigants generously makes it appropriate to consider plaintiff's additional materials, such as his ... memorandum." [Rivera v. Selsky](#), No. 9:05–CV–0967, 2007 WL 956998, at *1 n. 2 (N.D.N.Y. Jan. 5, 2007) (quoting [Gadson v. Goord](#), 96 Civ. 7544, 1997 WL 714878, at *1 n. 2 (S.D.N.Y. Nov. 17, 1997)).
- 4 Upstate is a maximum security prison comprised exclusively of SHU cells in which inmates are confined, generally though not always for disciplinary reasons, for twenty-three hours each day. See [Samuels v. Selsky](#), No. 01 CIV. 8235, 2002 WL 31040370, at *4 n. 11 (S.D.N.Y. Sept. 12, 2002).
- 5 Defendant's also seek a protective order pursuant to [Rule 26\(c\) of the Federal Rules of Civil Procedure](#) staying discovery in this matter pending final determination of their dismissal motion. Discerning no basis to conclude that plaintiff would be unduly prejudiced by such a stay, that application will be granted.
- 6 Section 301.6(a) of DOCS Directive No. 4933 permits an inmate confined in a medium or minimum security facility, or at Upstate, to be admitted into an SHU for various reasons, which can include confinement pursuant to a Tier II or III hearing

disposition. Plaintiff asserts that because he was transferred from Auburn, a maximum security facility, into an SHU unit, that section does not apply. Interestingly, a prior version of DOCS Directive No. 4933 provided, in relevant part, that [a]n inmate who is assigned to keeplock status and who is transferred to a maximum security facility shall not be assigned to the special housing unit at the receiving facility. Such inmate shall be assigned to keeplock within general population and shall have the same rights and responsibilities as other keeplock inmate in that facility.

Lee v. Coughlin, 26 F.Supp.2d 615, 628 (S.D.N.Y.1998) (quoting prior version of 7 NYCRR § 301.6(h)).

- 7 Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff. [Editor's Note: Appended decisions deleted for Westlaw purposes.]
- 8 Plaintiff alleges a litany of differences between the conditions experienced while in keeplock at Auburn and those in SHU at Upstate asserting, for example, that with regard to visits, he was required to travel to and from them in handcuffs, had to remain in handcuffs if he needed to use the restroom, and was not permitted to take photographs, and also that he did not have the same opportunities for social interaction with other prisoners and had to sleep with a light on. Plaintiff's Memorandum (Dkt.1–1) at pp. 11–12.As a matter of law, these alleged conditions can hardly be characterized as "exceed[ing] his sentence in an unexpected manner" or as imposing an "atypical and substantial hardship upon the [plaintiff] in relation to the ordinary incidents of prison life". *Sandin*, 515 U.S. at 484, 115 S.Ct. at 2300. "[T] fact that 'life in one prison is much more disagreeable than another does not itself signify that a Fourteenth Amendment liberty interest is implicated....'" *Halloway*, 2007 WL 2789499, at * 7 (quoting *Meachum v. Fano*, 427 U.S. 215, 225 (1976). Moreover, even if a liberty interest were alleged, plaintiff was afforded all the process he was due, by way of a disciplinary proceeding, before the alleged deprivation. *Carlisle*, 2007 WL 2769566, at * 3.
- 9 If no constitutional right would have been violated were the allegations established, no further inquiry regarding qualified immunity is necessary. *Kelsey*, 567 F.3d at 61 (quoting *Saucier*).
- 10 In *Okin*, the Second Circuit clarified that the " 'objectively reasonable' inquiry is part of the 'clearly established' inquiry", also noting that "once a court has found that the law was clearly established at the time of the challenged conduct and for the particular context in which it occurred, it is no defense for the [government] officer who violated the clearly established law to respond that he held an objectively reasonable belief that his conduct was lawful." *Okin*, 577 F.3d at 433 n. 11 (citation omitted).
- 11 Indeed, because qualified immunity is "an immunity from suit rather than a mere defense to liability ...", *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806 (1985), the Court has "repeatedly ... stressed the importance of resolving immunity questions at the earliest possible stage in the litigation." *Pearson*, — U.S. —, 129 S.Ct. at 815 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 524 (1991) (per curiam)).